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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LYNDON R. CUDDEBACK,

Defendant and Appellant.

D052191

(Super. Ct. No. SCE268756)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Judge. Reversed and remanded with instructions.

A jury convicted defendant Lyndon R. Cuddeback of one count of burglary of a restaurant (Pen. Code,¹ § 459), one count of residential burglary (§§ 459/460) and two counts of grand theft (§ 487, subd. (a)). In a bifurcated proceeding, the court found Cuddeback had served three prior prison terms (§§ 667.5, subd. (b), 668), had one prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and one prior

¹ All further statutory references are to the Penal Code unless otherwise specified.

strike conviction (§§ 667, subds. (b)-(i), 1170.12, 668). The court sentenced him to prison for 16 years, four months.

On appeal, Cuddeback contends: (1) trial counsel provided ineffective assistance by failing to subpoena a crucial alibi witness; (2) the court abused its discretion by refusing to grant a continuance to permit that alibi witness to be subpoenaed; and (3) the court abused its discretion and committed prejudicial error by failing to adequately inquire into appellant's claims of ineffective assistance of counsel. On the record presented on appeal, we conclude trial counsel provided effective assistance and the trial court properly refused to grant a continuance. We reverse, however, with instructions that the court hold a *Marsden* hearing to determine whether to appoint substitute counsel to file the new trial motion based on ineffective assistance of counsel.

FACTS

A. Prosecution Case

1. Marieta's Restaurant

Sometime after closing between 10:00 p.m. and 11:00 p.m. on September 6, 2006, Marieta's Restaurant on La Mesa Boulevard was burglarized. After the last patrons left, restaurant employees cleaned all the tables, locked all the doors and turned on the alarm system. When employees arrived early the next morning to open the restaurant, they discovered the front door was broken and called the owner, who called the police.

Inside the restaurant, papers were strewn about the floor; an ATM machine, which had contained about \$1,700, was broken and emptied; and the bubblegum machine was also damaged. The padlocks to the employees' lockers were cut or broken. The front

door of a large, heavy safe had been pried back, but not completely opened. Seven hundred dollars was missing from a small cash box in the office. The cassette to the security camera was missing. A metal pry bar was found on the floor about 10 feet inside the restaurant. The security alarm should have been activated when the front door was forced open, but the alarm never went off.

An open, partly full bottle of Dos Equis beer was on a table that had been cleared when the restaurant was closed. The restaurant serves Dos Equis beer which is kept in an unlocked refrigerator behind the restaurant's bar. The beer bottled was seized as evidence.

2. The Howard Residence

On September 8, 2006, Delores Howard lived in her home on Olive Hills Avenue in El Cajon with her son Stephen. Around 5:00 to 5:30 that morning, Stephen's birthday, Stephen went to his construction job. As she did nearly every day, Howard went to church at 7:15 a.m. After church, while running an errand, she got a flat tire and spent the rest of the day getting it replaced.

Between 7:30 and 8:30 a.m., a neighbor, walking her dog by the Howard home as she did every morning, noticed a faded red, older model truck with a camper shell parked in the driveway. She also heard a dog barking. This caught her attention because she had never seen that truck or heard a dog barking at the Howard house before.

Around 11:30 a.m., Howard's older son Michael, an investigator with the San Diego County District Attorney's Office, went to visit his mother at her home. When Michael arrived, he noticed the front door had been forced open and broken inward.

Once inside, he immediately noticed an extremely strong odor of cigarette smoke. He looked down and saw a cigarette butt on the carpet along with debris and a crucifix that had been knocked down. The condition of the house struck him as odd, because his mother is a meticulous housekeeper and no one was allowed to smoke in the house.

Michael went through the house calling for his mother, looking for her or anyone else who was there. At the end of the hallway, he saw another cigarette butt on the carpet. In his mother's bedroom, papers were strewn all around, dresser drawers were open and a statue of the Virgin Mary was on the ground. Michael went outside, leaving the house in the same condition, and saw his mother's car was gone.

Before calling the police, Michael made several telephone calls and left a message for Stephen. Also, he tried to locate his mother at the church she attended. Stephen, who was at work, returned Michael's call between 1:30 and 2:00 p.m. Michael returned to his mother's house and called the police. Around 4:00 or 5:00 p.m., Howard, Stephen and the police all arrived within 15 minutes of each other. Michael advised the officers of the two cigarette butts and pointed out the cigarette butt near the front door. This cigarette was impounded as evidence.

Howard and Stephen discovered Howard's jewelry cabinet and all of her jewelry were missing, as were a Remington statue, a jewelry box Stephen had made for her, a file containing her will and estate papers, shoes and clothes from Stephen's room, and Stephen's baseball card collection. A pillow case and a bedspread were also missing. The value of the missing items totaled about \$16,000.

At trial, during the prosecution case, Stephen conceded he was a felon and has been living with Howard since his release from prison in June 2006. He regularly reported to his parole officer and has been employed full time. His time card from work reflected he worked in Escondido from 7:00 a.m. until 3:30 p.m. on September 8. Stephen recognized appellant at trial. They became acquainted during a few weeks in 2003 when they were both in prison and assigned to the Sierra Conservation Center in Jamestown. Stephen testified he chews tobacco, but does not smoke. Stephen never invited appellant to his mother's home and he had not seen him since 2003. Stephen denied having anything to do with the burglary or wanting to see what was in Howard's will.

3. DNA Evidence

When tested, the DNA recovered from the mouth of the beer bottle and the cigarette butt matched appellant's DNA profile.

4. Defendant's Statements to Police

Detectives contacted appellant at Ironwood State Prison on February 8, 2007. Appellant denied he had been to Marieta's Restaurant. He denied he drank or smoked. He reported that associates of his, named "Eric" and "Scribbles," told him about numerous commercial burglaries they had committed, including breaking into safes, and selling the stolen property on eBay. Appellant reported that Eric and Scribbles told him they had broken into a restaurant. Appellant further told detectives that Eric and Scribbles drive a red or maroon Nissan pickup truck or Ford Explorer.

B. Defense Case

Appellant's daughter Shaelyn Cuddeback (Shaelyn) testified she had driven him to the Howard residence two or three times in September 2006. She would wait while her father talked outside the home with a man she knew as "Lumpy." She saw her father smoke during these conversations. She did not ever see Lumpy smoke, but bought him chewing tobacco once. She had also seen Lumpy at her grandmother's house that month, talking with her father.

Appellant testified and denied being involved in either burglary. According to appellant, on September 6 around 9:00 or 9:30 p.m., he and his brother were at Marieta's Restaurant, where they had a beer and a burrito. Appellant, who admitted having committed theft crimes in the past and spending time in prison, testified he met Stephen while they were at Jamestown in 2003. They spoke to each other on a regular basis and exercised together. They shared the same dorm for about eight months, until they were both transferred to different camps. Appellant also testified that, after his release from Jamestown, he visited Stephen at the Howard residence at least six times, where he smoked cigarettes on the curb or on the porch and stayed five to 20 minutes. Appellant had also seen Stephen at other locations, including appellant's former mother-in-law's house.

Appellant did not believe he was at the Howard residence on September 8, 2006. On that day, appellant worked for the mother of his friend Katherine Lee, installing an alarm system and security lights at her house in Lakeside.

On cross-examination, appellant testified he may have told detectives he did not drink because he is not a heavy drinker and does not equate having a beer with being a drinker. Also, appellant testified he has smoked all his life. Moreover, appellant testified Lee, the mother of Eric's children, was actually the one who told him about the burglaries committed by Eric and Scribbles.

Appellant admitted he was trying to be evasive when he was interviewed by the detectives because he believed they were already charging him with the crimes, and because he did not want to have trouble on the prison yard for talking to the police for too long.

DISCUSSION

I

Appellant contends his rights to compulsory process and effective assistance of counsel were violated by: (1) counsel's failure to subpoena an alibi witness who indicated she would voluntarily testify; and (2) the court's refusal to grant a continuance to subpoena that alibi witness. Additionally, appellant contends the court abused its discretion by denying his request for a continuance and appointment of substitute counsel for the purpose of filing a motion for new trial.

A. Procedural Background

At the close of the prosecution's case in chief, defense counsel indicated he would be calling Katherine Weide.² According to Weide's statement to a defense investigator,

² Katherine Weide is also referred to as Katherine Lee elsewhere in the record.

appellant's acquaintance Eric is the father of her son, and Eric and Scribbles were responsible for certain crimes. According to the defense investigator, Weide would testify that during the first week of September 2006 appellant was working at her mother's house, installing security lights and completing other tasks and he was there all week from about 7:30 a.m. until 9:00 p.m.

However, Weide did not appear at trial as defense counsel anticipated and she did not return his telephone calls. Trial counsel stated he had not subpoenaed Weide as a witness because she was cooperative with the defense investigator and indicated she would appear to testify.

When Weide did not appear, defense counsel sent appellant's daughter Shaelyn to serve Weide with a subpoena. Shaelyn testified Weide never touched the subpoena and stated she would not testify. The court refused to issue a warrant for Weide's arrest. The court found Weide had not been validly served with the subpoena. The court also stated it was unwilling to continue the trial to allow another attempt to subpoena Weide because it appeared she did not want to accept the subpoena or come to court to testify.

B. Trial Counsel Provided Effective Assistance of Counsel

A criminal defendant is guaranteed the right to the assistance of counsel by both the state and the federal Constitutions. "Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

To obtain relief on the grounds of ineffective assistance of counsel, a defendant must establish both counsel's deficiency and resulting prejudice. Specifically, a defendant must show: (1) that " 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms' " (*In re Fields* (1990) 51 Cal.3d 1063, 1069, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688), and (2) " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*Id.* at p. 1070, quoting *Strickland* at pp. 693-694.) (See also *People v. Williams* (1988) 44 Cal.3d 883, 937 [recognizing it is the defendant's burden to establish both deficiency and prejudice].) In establishing prejudice, the defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*Ibid.*) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions" (*People v. Holt* (1997) 15 Cal.4th 619, 703) and will reverse on the ground of inadequate assistance of counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Here, appellant failed to carry his burden of showing either deficiency or prejudice.

The record does not show defense counsel's failure to subpoena Weide to testify was not a tactical decision. We believe there is a satisfactory explanation for such failure. Counsel stated he had not subpoenaed Weide as a witness because she was cooperative with the defense investigator and indicated she would appear to testify. Subpoenaing a cooperative witness runs the risk of offending and thereby alienating the

witness. To the extent that Weide would aid appellant's defense by implicating Eric, the father of her son, and Scribbles as responsible for certain crimes, it was reasonable for counsel to believe that compelling her testimony under subpoena might dissuade Weide from testifying at all.

Further, this case is not one in which the attorney made no effort to effect service. When Weide did not appear as defense counsel anticipated, counsel sent appellant's daughter Shaelyn to serve Weide with a subpoena. However, Shaelyn testified Weide never touched the subpoena and stated she would not testify. Although in hindsight counsel's tactical decision may have been unsuccessful, not every tactical failure amounts to ineffective assistance of counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Because counsel had a rational tactical purpose for not issuing a subpoena to Weide, we conclude his failure to subpoena the witness to testify did not breach the objective standard of reasonableness under prevailing professional norms.

Even had appellant shown counsel's performance was deficient in some respect, he provided no evidence showing the outcome of the case would have been different absent the deficiency. The case against appellant was very strong. DNA recovered from the mouth of the Dos Equis beer bottle inside Marieta's Restaurant matched appellant's DNA profile. Appellant's testimony that he had eaten at the restaurant with his brother near closing time on the night of the burglary was contradicted by the testimony of a restaurant employee that there was only one table, with a party of three, occupied that night. Further, the employees cleaned off all the tables when closing the restaurant.

Similarly, DNA recovered from the cigarette butt in the entry way of the Howard residence on the day of the burglary matched appellant's DNA profile. No one in the house smoked and appellant had not been in the house before.

Moreover, appellant lied to the detectives, denying he drank or smoked or had ever been inside Marieta's Restaurant. Indeed, at trial appellant's testimony contradicted these statements.

In light of the strong evidence inculcating appellant, Weide's anticipated testimony that appellant could not have committed the crimes because he was working at her mother's house would not likely have resulted in a more favorable determination. In fact, Weide did not appear voluntarily at trial, return defense counsel's telephone calls or accept the subpoena because she did not want to testify. Thus, an inference can be drawn that she would not have testified in the manner anticipated by trial counsel. In sum, appellant has not established prejudice from the failure to subpoena the witness.

C. The Court Properly Denied Appellant's Request For Continuance

Appellant contends the court abused its discretion by denying his requested continuance to permit Weide to be subpoenaed. "Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037, quoting *People v. Howard*

(1992) 1 Cal.4th 1132, 1171.) When a witness is not under subpoena, his or her absence generally does not constitute good cause for the continuance of a trial. (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 271.) Trial courts possess broad discretion in determining whether the facts of a particular case require granting a continuance of the trial. (*People v. Grant* (1988) 45 Cal.3d 829, 844.) "In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction." (*People v. Laursen* (1972) 8 Cal.3d 192, 204.)

No error appears under this standard. Weide did not appear voluntarily at trial nor did she return defense counsel's telephone calls. The court was unwilling to continue the trial to allow another attempt to subpoena Weide because it appeared she did not want to accept the subpoena or come to court to testify. Because Weide was resistant to appearing at appellant's trial, there was no showing her attendance could have been secured within a reasonable time—or at any time. Consequently, the court acted well within its discretion when it declined to continue the trial to subpoena the witness.

II

Appellant contends the court committed prejudicial error by failing to adequately inquire into his claims of ineffective assistance of counsel, as mandated by *People v. Marsden* (1970) 2 Cal.3d 118. The People respond that any error in the court's failure to conduct a *Marsden* hearing was harmless beyond a reasonable doubt. Alternatively, the People acknowledge the remedy for *Marsden* error is to reverse and remand the case for

the limited purpose of conducting a *Marsden* hearing to investigate ineffective assistance of counsel to pursue a new trial motion.

A. Procedural Background

Before sentencing, defense counsel indicated that, based on appellant's comments in the probation report and his conversations with counsel, appellant sought a continuance and substitution of new appointed counsel for the purposes of pursuing a motion for new trial based on the inadequacy of trial counsel's representation. The trial court, in its independent review of the trial, did not find ineffective assistance of counsel issues and advised that any such issues could be explored on appeal. The trial court then denied the motions to continue and to substitute counsel to investigate ineffective assistance of counsel for purposes of a new trial motion.

B. The Court Erred By Failing To Adequately Inquire Into Appellant's Request For Substitute Counsel For The Purpose of Filing A Motion For New Trial

A defendant "may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Under *Marsden*, when a defendant seeks substitute appointed counsel based on a claim of inadequate representation, the trial court must afford the defendant an opportunity to articulate the basis for the request and to relate specific instances of counsel's deficient performance. (*Marsden, supra*, 2 Cal.3d at pp. 123-124.) A defendant is entitled to relief if the record clearly shows that the appointed attorney is not providing adequate

representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation likely will result. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *Marsden, supra*, 2 Cal.3d at pp. 124-125.) The rule requiring a *Marsden* hearing applies equally post-trial. "[T]he trial court should appoint substitute counsel when a proper [*Marsden*] showing has been made at any stage" because "[a] defendant is entitled to competent representation at all times" during the proceedings. (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

While the decision whether to allow a defendant to substitute appointed counsel rests within the sound discretion of the trial court, the court "cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request." (*Marsden, supra*, 2 Cal.3d at p. 123.) Accordingly, "a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney." (*Id.* At p. 124; see also *People v. Lewis* (1978) 20 Cal.3d 496, 499 ["Because the defendant might have catalogued acts or events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving the defendant an opportunity to do so denied him a fair trial"].) The denial of a *Marsden* motion without careful inquiry into the defendant's reasons for requesting substitute

counsel does not qualify as an informed judicial determination. (*Marsden, supra*, 2 Cal.3d at p. 124; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666.)

Here, the court should have treated appellant's initial complaints about defense counsel's representation as a *Marsden* motion, conducted the appropriate hearing and determined whether he was entitled to appointment of substitute counsel. No formal motion is necessary to trigger the court's obligations under *Marsden* provided there is " 'at least some clear indication by defendant that he wants a substitute attorney.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.)

Appellant sought a continuance and appointment of substitute counsel for the purpose of a motion for new trial. Nonetheless, the court denied appellant's requests, stating, "the court, in its own independent review of the trial, does not feel that there are any IAC issues that stand out, and I am not inclined to continue the case, appoint new counsel to investigate that, any IAC issues that may exist. By that, I mean, ineffective assistance of counsel issues that may exist may be explored on appeal." Thus, the court erred when it did not inquire into appellant's reasons for requesting a change of attorneys.

We ordinarily review an order denying a *Marsden* motion under the deferential abuse of discretion standard. (*People v. Berryman, supra*, 6 Cal.4th at p. 1070.) However, where, as here, there is a failure to comply with the requirements of *Marsden*, the error compels reversal unless the record shows the error was harmless beyond a reasonable doubt. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349; *Marsden, supra*, 2 Cal.3d at p. 126.)

The People have the burden to establish the failure to hold a *Marsden* hearing was harmless beyond a reasonable doubt by showing the error did not have any effect on the post-conviction proceedings. No such showing has been made here. Because the court failed to provide appellant with an adequate opportunity to fully explain his contention for appointment of new counsel, we cannot determine from the record before us whether appellant's assignments of ineffective assistance are meritless. Under these circumstances, we cannot say the error in failing to hold a *Marsden* hearing was harmless beyond a reasonable doubt.

DISPOSITION

Accordingly, the judgment is reversed and remanded with instructions to the trial court to conduct a post-conviction *Marsden* hearing. If, on remand, the court grants the *Marsden* motion, a new trial motion is filed, and the new trial motion is granted, appellant shall receive a new trial. If the court denies the *Marsden* motion, or a new trial motion is not filed, or a new trial motion is filed and denied, the court shall reinstate the judgment.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.